U.S. Customs Service

Treasury Decisions

19 CFR Part 191

(T.D. 02–38)

RIN 1515–AD02

MANUFACTURING SUBSTITUTION DRAWBACK: DUTY APPORTIONMENT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim rule; solicitation of comments.

SUMMARY: This document amends the Customs Regulations on an interim basis to provide the method for calculating manufacturing substitution drawback where imported merchandise, which is dutiable on its value, contains a chemical element and amounts of that chemical element are used in the manufacture or production of articles which are either exported or destroyed under Customs supervision. Recent court decisions have held that a chemical element that is contained in an imported material that is subject to an *ad valorem* rate of duty may be designated as same kind and quality merchandise for drawback purposes. This amendment provides the method by which the duty attributable to the chemical element can be apportioned. This amendment requires a drawback claimant, where applicable, to make this apportionment calculation.

DATES: This interim rule is effective July 24, 2002. Comments must be received on or before September 23, 2002.

ADDRESS: Written comments (preferably in triplicate) may be submitted to the U.S. Customs Service, Office of Regulations & Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Submitted comments may be inspected at the U.S. Customs Service, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FURTHER INFORMATION CONTACT: William G. Rosoff, Chief, Duty and Refund Determinations Branch, Office of Regulations and Rulings, U.S. Customs Service, Tel. (202) 572–8807.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Drawback—19 U.S.C. 1313

Section 313 of the Tariff Act of 1930, as amended, (19 U.S.C. 1313), concerns drawback and refunds. Drawback is a refund of certain duties, taxes and fees paid by the importer of record and granted to a drawback claimant upon the exportation, or destruction under Customs supervision, of eligible articles. The purpose of drawback is to place U.S. exporters on equal footing with foreign competitors by refunding most of the duties paid on imports used in domestic manufactures intended for export.

Substitution for drawback purposes—19 U.S.C. 1313(b)

There are several types of drawback. Under section 1313(b), a manufacturer can recoup duties paid for imported merchandise if it uses merchandise of the same kind and quality to produce exported articles pursuant to the terms of the statute. Section 1313(b) reads, in pertinent part, as follows:

> (b) *Substitution for drawback purposes*
> If imported duty-paid merchandise and any other merchandise (whether imported or domestic) of the same kind and quality are used in the manufacture or production of articles within a period not to exceed three years from the receipt of such imported merchandise by the manufacturer or producer of such articles, there shall be allowed upon the exportation, or destruction under customs supervision, of any such articles, notwithstanding the fact that none of the imported merchandise may actually have been used in the manufacture or production of the exported or destroyed articles, an amount of drawback equal to that which would have been allowable had the merchandise used therein been imported * * *."

Manufacturing substitution drawback is intended to alleviate some of the difficulties in accounting for whether imported merchandise has, in fact, been used in a domestic manufacture. Section 1313(b) permits domestic or other imported merchandise to be used as the basis for drawback, instead of the actual imported merchandise, so long as the domestic merchandise is of the "same kind and quality" as the actual imported merchandise.

Several recent court cases have examined the scope of the term "same kind and quality" as used in 19 U.S.C. 1313(b). *See E.I. DuPont De Nemours and Co. v. United States*, 116 F. Supp. 2d 1343 (Ct. Int'l Trade 2000). *See also International Light Metals v. United States*, 194 F.3d 1355 (Fed. Cir. 1999). In these cases, the courts held that a chemical element that is contained in an imported material that is dutiable on its value may be designated as same kind and quality merchandise for purposes of manufacturing substitution drawback pursuant to 19 U.S.C. 1313(b).

In *DuPont*, the court held that apportionment is a feasible method of claiming a drawback entitlement. *DuPont*, 116 F. Supp. 2d at 1348–49. Under these regulations, therefore, a substitution drawback claimant must apportion the duty attributable to a chemical element contained in an *ad valorem* duty-paid imported material if it is claimed that a chemical element was used in the domestic production of articles that were exported or destroyed under Customs supervision within the prescribed time period. The drawback claim on the chemical element that is the designated merchandise must be limited to the duty apportioned to that chemical element on a unit-for-unit attribution using the unit of measure set forth in the Harmonized Tariff Schedule of the United States that is applicable to the imported material. The apportionment is necessary to avoid overpayment of drawback.

Amendment to § 191.26(b) of the Customs Regulations

Section 191.26 of the Customs Regulations (19 CFR 191.26) sets forth the recordkeeping requirements for manufacturing drawback. Paragraph (b) of this section describes the recordkeeping requirements for substitution drawback.

To implement the courts' interpretation of 19 U.S.C. 1313(b), this document amends § 191.26(b) by adding language that explains how to apportion the duty attributable to same kind and quality chemical elements contained in *ad valorem* duty-paid imported materials for purposes of manufacturing substitution drawback. This document also amends § 191.26(b) to provide an example of apportionment calculations.

Duty apportionment calculation

In order for a drawback claimant to be able to ascertain what portion of the *ad valorem* duty paid on imported merchandise is attributable to a chemical element contained in the merchandise, an apportionment calculation is necessary. First, if the imported duty-paid material is a compound with other constituents, including impurities, and the purity of the compound in the imported material is shown by satisfactory analysis, that purity, converted to a decimal equivalent of the percentage, is multiplied against the entered amount of the material to establish the amount of pure compound. The amount of the element in the pure compound is to be determined by use of the atomic weights of the constituent elements, converting to the decimal equivalent of their respective percentages, and multiplying that decimal equivalent against the above-determined amount of pure compound. Second, the amount claimed as drawback based on a contained element must be taken into account and deducted from the duty paid on the imported material that may be claimed on any other drawback claim.

COMMENTS

Before adopting this interim regulation as a final rule, consideration will be given to any written comments timely submitted to Customs, including comments on the clarity of this interim rule and how it may be

made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), §1.4 of the Treasury Department Regulations (31 CFR 1.4), and §103.11(b) of the Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 799 9th Street, N.W., Washington, D.C.

INAPPLICABILITY OF PRIOR PUBLIC NOTICE AND COMMENT PROCEDURES

Pursuant to the provisions of 5 U.S.C. 553(b)(B), Customs has determined that prior public notice and comment procedures on this regulation are unnecessary and contrary to public interest. The regulatory changes to the Customs Regulations add language necessitated by recent decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit. The regulatory changes benefit the public by providing specific information as to how a drawback claimant is to correctly make the requisite duty apportionment calculations when claiming manufacturing substitution drawback for a chemical element contained in *ad valorem* duty-paid imported merchandise. For these reasons, pursuant to the provisions of 5 U.S.C. 553(d)(1) and (3), Customs finds that there is good cause for dispensing with a delayed effective date.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

REGULATORY FLEXIBILITY ACT

Because no notice of proposed rulemaking is required for this rule, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq*.) do not apply.

DRAFTING INFORMATION

The principal author of this document was Suzanne Kingsbury, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 191

Claims, Commerce, Customs duties and inspection, Drawback.

AMENDMENT TO THE REGULATIONS

For the reason stated above, part 191 of the Customs Regulations (19 CFR part 191), is amended as set forth below.

PART 191—DRAWBACK

1. The general authority citation for part 191 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 22, Harmonized Tariff Schedule of the United States), 1313, 1624.

* * * * * * *

2. Section 191.26 is amended:

a. In paragraph (b)(2) by removing the word "and" after the semicolon;

b. At the end of paragraph (b)(3) by removing the period and adding "; and";

c. By adding a new paragraph (b)(4) to read as follows:

§ 191.26 Recordkeeping for manufacturing drawback.

* * * * * * *

(b) *Substitution manufacturing.* * * *

(4) If the designated merchandise is a chemical element that was contained in imported material that was subject to an *ad valorem* rate of duty, and a substitution drawback claim is made based on that chemical element:

(i) The duty paid on the imported material must be apportioned among its constituent components. The claim on the chemical element that is the designated merchandise must be limited to the duty apportioned to that element on a unit-for-unit attribution using the unit of measure set forth in the Harmonized Tariff Schedule of the United States (HTSUS) that is applicable to the imported material. If the material is a compound with other constituents, including impurities, and the purity of the compound in the imported material is shown by satisfactory analysis, that purity, converted to a decimal equivalent of the percentage, is multiplied against the entered amount of the material to establish the amount of pure compound. The amount of the element in the pure compound is to be determined by use of the atomic weights of the constituent elements and converting to the decimal equivalent of their respective percentages and multiplying that decimal equivalent against the above-determined amount of pure compound.

(ii) The amount claimed as drawback based on the chemical element must be deducted from the duty paid on the imported material that may be claimed on any other drawback claim.

Example

Synthetic rutile that is shown by appropriate analysis in the entry papers to be 91.7% pure titanium dioxide is imported and dutiable at a 5% *ad valorem* duty rate. The amount of imported synthetic rutile is 30,000 pounds with an entered value of $12,000. The total duty paid is $600. Titanium in the synthetic rutile is designated as the basis for a drawback claim under 19 U.S.C. 1313(b). The amount of titanium dioxide in the synthetic rutile is determined by converting the percentage (91.7%) to its decimal equivalent (.917) and multiplying the entered amount of synthetic rutile (30,000 pounds) by that decimal equivalent (.917 x 30,000 = 27,510 pounds of titanium dioxide). The titanium, based on atomic weight, represents 59.93% of the constituents in titanium dioxide. Multiplying that percentage, converted to its decimal equivalent, by the amount of titanium dioxide determines the titanium content of the

imported synthetic rutile (.5993 x 27,510 pounds = 16,486.7 pounds). Therefore, up to 16,486.7 pounds of titanium is available to be designated as the basis for drawback. The ratio between the amount of titanium and the total amount of imported synthetic rutile is determined by dividing the weight of the titanium by the weight of the synthetic rutile (16,486.7 ÷ 30,000 = .550) or 55%. Accordingly, 55% of the duty is apportioned to the titanium content which is the designated merchandise of the imported synthetic rutile. As the per-unit duty paid on the synthetic rutile is calculated by dividing the duty ($600) by the amount of the imported synthetic rutile (30,000), the per-unit duty is two cents of duty per pound ($600 ÷ 30,000 = $0.02). The per pound duty on the titanium is calculated by multiplying the factor of 55% (.55 x $0.02 = $0.011 per pound). If an exported titanium alloy ingot weighs 17,000 pounds, in which 16,000 pounds of titanium was used to make the ingot, drawback is determined by multiplying the duty per pound factor ($0.011 per pound) by the weight of the titanium contained in the ingot (16,000 pounds) to calculate the duty available for drawback ($0.011 x 16,000 = $176). Because only 99% of the duty can be claimed, drawback is determined by multiplying the available duty amount by 99% (.99 x $176 = $174.24). As the oxygen content of the titanium dioxide is 45% of the synthetic rutile, if oxygen is the designated merchandise on another drawback claim, that factor would be used to determine the duty available for drawback based on the substitution of oxygen.

ROBERT C. BONNER,
Commissioner of Customs.

Approved: July 18, 2002.

TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, July 24, 2002 (67 FR 48368)]

19 CFR Part 191

(T.D. 02–39)

RIN 1515–AC67

MERCHANDISE PROCESSING FEE ELIGIBLE TO BE CLAIMED AS UNUSED MERCHANDISE DRAWBACK

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, with some changes, the interim rule amending the Customs Regulations that was published in the Federal Register on February 9, 2001, as T.D. 01–18. The interim rule amended the regulations to indicate that merchandise processing fees are eligible to be claimed as unused merchandise drawback. The change was made to reflect a recent court decision in which merchandise processing fees were found to be assessed under Federal law and imposed by reason of importation and therefore eligible to be claimed as unused merchandise drawback pursuant to 19 U.S.C. 1313(j). The amendment requires a drawback claimant to apportion the merchandise processing fee to that merchandise that provides the basis for drawback.

EFFECTIVE DATE: July 25, 2002.

FOR FURTHER INFORMATION CONTACT: William G. Rosoff, Chief, Duty and Refund Determinations Branch, Office of Regulations and Rulings, U.S. Customs Service, Tel. (202) 572–8807.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Merchandise Processing Fees—19 U.S.C. 58c(a)(9)(A)

Merchandise processing fees are fees the Secretary of the Treasury charges and collects for the processing of merchandise that is formally entered or released into the United States. *See* 19 U.S.C. 58c(a)(9)(A). A merchandise processing fee is assessed as a percentage of the value of the imported merchandise, as determined under 19 U.S.C. 1401a. The *ad valorem* rate is currently 0.21 percent. (*See* 19 CFR 24.23). Section 58c(b)(8)(A)(i) provides that the fee charged under subsection (a)(9) may not be less than $25, unless adjusted pursuant to subsection (a)(9)(B) of this section.

Merchandise processing fees are subject to two monetary limits:

(1) A cap of $485 is imposed by 19 U.S.C. 58c(a)(9)(B)(i) for any release or entry, including weekly Free Trade Zone entries (*see* section 410 of the Trade and Development Act of 2000, Pub. L. 106–200, 114 Stat. 251, enacted on May 18, 2000), for which the value of merchandise subject to the fee exceeds $230,952.38 ($485 ÷ .0021 = $230,952.38), and;

(2) For certain monthly entries, as prescribed by Pub. L. 101–382, section 111(f), as amended, and implemented by § 24.23(d) of the Customs Regulations (19 CFR 24.23(d)), the merchandise processing fee is limited to the lesser of the following:

(i) A cap of $400 where the value of the merchandise subject to the fee exceeds $190,476.19 ($400 ÷ .0021 = $190,476.19); or

(ii) The amount determined by applying the *ad valorem* rate under paragraph (b)(1)(i)(A) of § 24.23 to the total value of such daily importations.

Drawback—19 U.S.C. 1313

Section 313 of the Tariff Act of 1930, as amended, (19 U.S.C. 1313), concerns drawback and refunds. Drawback is a refund of certain duties, taxes and fees paid by the importer of record and granted to a drawback claimant under specific conditions. There are several types of drawback. Section 1313(j) concerns drawback for "unused merchandise," and provides, pursuant to specific conditions set forth therein, that a refund of 99 percent of each duty, tax, or fee "imposed under Federal law because of [an article's] importation" will be refunded as drawback.

Merchandise Processing Fees Eligible to be Claimed as Unused Merchandise Drawback

The issue of whether a merchandise processing fee is "imposed under Federal law because of [an article's] importation," and therefore eligible to be claimed as unused merchandise drawback pursuant to the terms of section 1313(j), was recently examined by the Court of Appeals for the Federal Circuit (CAFC) in *Texport Oil v. United States*, 185 F.3d 1291 (Fed. Cir. 1999). In that case, the court held that as merchandise processing fees are "assessed under Federal law" (pursuant to 19 U.S.C. 58c(a)(9)) and "explicitly linked to import activities," they are imposed by reason of importation and therefore subject to unused merchandise drawback by application of the statute.

On February 9, 2001, Customs published in the Federal Register (66 FR 9647), as T.D. 01–18, an interim rule amending §§ 191.2, 191.3 and 191.51 to reflect the CAFC's decision in *Texport Oil*. In that document, the Customs Regulations were amended to allow merchandise processing fees to be claimed as unused merchandise drawback, and to provide specific information as to how a drawback claimant is to correctly calculate that portion of a merchandise processing fee that is eligible to be claimed as unused merchandise drawback.

DISCUSSION OF COMMENTS

Two commenters responded to the solicitation of public comment published in T.D. 01–18. A description of the comments received, together with Customs analyses, is set forth below.

Comment:

One commenter noted that the illustration presented in Example 2, as set forth in the amendments to § 191.51, is inaccurate and inconsis-

tent with the provisions of § 191.51(b)(2)(iii). Pursuant to § 191.51(b)(2)(iii), "the amount of merchandise processing fee apportioned to each line item is multiplied by 99 percent to calculate that portion of the fee attributable to each line item that is eligible for drawback." It is noted that although Example 1 in § 191.51 illustrates the amount of merchandise processing fee eligible for drawback per line item by multiplying by 99 percent (0.99), Example 2 does not. As a result, some of the figures used in Example 2 are incorrect.

Customs response:

Customs agrees with the comment submitted regarding Example 2. Consequently, this document amends § 191.51, Example 2, to insert language that illustrates the amount of merchandise processing fee eligible for drawback per line item by multiplying the amount by 99 percent (0.99). As a result of this amendment, the figures in Example 2 will be revised. It is also noted that this document corrects a clerical error in Example 2, Line Item 1, and the figure $70,000 will be replaced by the figure $7,000.

Comment:

One commenter opposed the apportionment formula set forth in T.D. 01–18 and proposed that the merchandise processing fees not be apportioned across the entire entry, but be allowed to be allocated to individual items. The commenter also notes that as drawback for merchandise processing fees is allowed pursuant to section 1313(p)(4)(B), the Customs Regulations should be amended to reflect this fact.

Customs response:

Customs does not agree with the commenter's proposal. It is noted that pursuant to 19 U.S.C. 58c(a)(9)(B)(i), a merchandise processing fee cap of $485 is applicable to each entry. For this reason, it is necessary that the merchandise processing fee be apportioned and refunded as a percentage of the entire entry.

The commenter's statement that the Customs Regulations should be amended to include reference to the fact that section 1313(p)(4)(B) authorizes drawback for merchandise processing fees has merit. Customs will prepare another document for publication in the Federal Register that amends the regulations in this regard.

CONCLUSION

After review of the comments and further consideration, Customs has decided to adopt as a final rule the interim rule published in the Federal Register (66 FR 6647) on February 9, 2001, as T.D. 01–18, with changes, discussed above, regarding amendment to § 191.51, Example 2, to insert language that illustrates the amount of merchandise processing fee eligible for drawback per line item by multiplying the amount by 99 percent (0.99). As a result of this amendment, the figures in Example 2 will be revised. This document also corrects a clerical error in Example 2, Line Item 1, whereby the figure $70,000 will be replaced by the figure $7,000.

INAPPLICABILITY OF DELAYED EFFECTIVE DATE

These regulations serve to conform the Customs Regulations to reflect a recent decision by the Court of Appeals for the Federal Circuit and to finalize an interim rule that is already effective. In addition, the regulatory changes benefit the public by allowing merchandise processing fees to be claimed as unused merchandise drawback, and by providing specific information as to how a drawback claimant is to correctly calculate that portion of a merchandise processing fee that is eligible to be claimed as unused merchandise drawback. For these reasons, pursuant to the provisions of 5 U.S.C. 553(d)(1) and (3), Customs finds that there is good cause for dispensing with a delayed effective date.

THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Because no notice of proposed rulemaking was required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq*.) do not apply. Further, these amendments do not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

DRAFTING INFORMATION

The principal author of this document was Ms. Suzanne Kingsbury, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 191

Claims, Commerce, Customs duties and inspection, Drawback.

AMENDMENT TO THE REGULATIONS

For the reasons stated above, the interim rule amending §§ 191.2, 191.3 and 191.51 of the Customs Regulations (19 CFR 191.2, 191.3 and 191.51), which was published at 66 FR 9647–9650 on February 9, 2001, is adopted as a final rule with the changes set forth below.

PART 191—DRAWBACK

1. The general authority citation for part 191 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States), 1313, 1624.

2. In § 191.51(b)(2), Example 2 is revised to read as follows:

§ 191.51 Completion of drawback claims.

* * * * * * *

(b) Drawback due.—

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(2) *Merchandise processing fee apportionment calculation*.

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Example 2

This example illustrates the treatment of dutiable merchandise that is exempt from the merchandise processing fee and duty-free merchandise that is subject to the merchandise processing fee.

Line item 1 — 700 meters of printed cloth valued at $10 per meter (total value $7,000) that is exempt from the merchandise processing fee under 19 U.S.C. 58c(b)(8)(B)(iii)
Line item 2 — 15,000 articles valued at $100 each (total value $1,500,000)
Line item 3 — 10,000 duty-free articles valued at $50 each (total value $500,000)

The relative value ratios are calculated using line items 2 and 3 only, as there is no merchandise processing fee imposed by reason of importation on line item 1.

Line item 2 — 1,500,000 ÷ 2,000,000 = .75 (line items 2 and 3 form the total value of the merchandise subject to the merchandise processing fee).
Line item 3 — 500,000 ÷ 2,000,000 = .25.

If the total merchandise processing fee paid was $485, the amount of the fee attributable to line item 2 is $363.75 (.75 x $485 = $363.75). The amount of the fee attributable to line item 3 is $121.25 (.25 x $485 = $121.25).

The amount of merchandise processing fee eligible for drawback for line item 2 is $360.1125 (.99 x $363.75). The amount of fee eligible for line item 3 is $120.0375 (.99 x $121.25).

The amount of drawback on the merchandise processing fee attributable to each unit of line item 2 is $.0240 ($360.1125 ÷ 15,000 = $.0240). The amount of drawback on the merchandise processing fee attributable to each unit of line item 3 is $.0120 ($120.0375 ÷ 10,000 = $.0120).

If 1,000 units of line item 2 were exported, the drawback attributable to the merchandise processing fee is $24.00 ($.0240 x 1,000 = $24.00).

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ROBERT C. BONNER,
Commissioner of Customs.

Approved: July 19, 2002.
TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, July 25, 2002 (67 FR 48547)]

ERRATA

In Customs Bulletin and Decisions, Vol. 36, No. 30 of July 24, 2002, on page 17, a document entitled "Foreign Currencies—Quarterly Rates of Exchange: July 1, 2002 Through September 30, 2002" was misdesignated as T.D. No. 02–36. The correct T.D. number designation for that document is T.D. 02–41.

JOSEPH CLARK,
Office of Regulations and Rulings.